Supreme Court, U. S.
FILED
AUG 6 1980
MICHAEL RODAK, JR., CLERK

80-220

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

SEPTEMBER TERM, 1980

* * *

THE UNIDENTIFIED REMAINS OF A VESSEL, ETC.,

Petitioner

V.

PLATORO LIMITED, INC.,

Respondent

* * *

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

* * *

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QUESTIONS PRESENTED

1. Was the Court of Appeals correct in holding that 46 U.S.C. §730 authorizes a foreign corporation to maintain, as against the State of Texas, an action pursuant to 46 U.S.C. §§721, et seq. for alleged salvage services rendered where such action was not instituted until some nine and one-half years after termination of the services in question?

2. Was the Court of Appeals correct in passing upon the issue of "marine peril" where such issue was expressly reserved from ruling by the District Court.

INTERESTED PARTIES

1. The State of Texas, by and through its Attorney General, the Honorable Mark White, and Connie Ode, Assistant Attorney General, P.O. Box 12548, Capitol Station, Austin, Texas 78711.

2. Platoro Limited, Inc., and its attorneys of record, O'Leary, Sanchez & Benton, P.C., P.O. Box 4215, Brownsville, Texas 78520.

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

* * *

Petitioner, the State of Texas, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered on April 4, 1980, with rehearing denied on May 8, 1980.

OPINION BELOW

The opinion of the Court of Appeals is reported at 614 F.2d 1051. The opinion is attached as an Appendix hereto. Also attached are the Memorandum and Order and Judgment of the District Court that were appealed by Respondent to the Court of Appeals.

JURISDICTION

The opinion of the Court of Appeals was entered on April 4, 1980. A timely petition for rehearing with a

suggestion that the rehearing be en banc was denied on May 8, 1980. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

The statutes involved are 46 U.S.C. §§721, et seq. Section 730 thereof provides as follows:

> A suit for the recovery of remuneration for rendering assistance or salvage services shall not be maintainable if brought later than two years from the date when such assistance or salvage was rendered, unless the court in which the suit is brought shall be satisfied that during such period there had not been any reasonable opportunity of arresting the assisted or salved vessel within the jurisdiction of the court or within the territorial waters of the country in which the libelant resides or has his principal place of business.

STATEMENT OF THE CASE

This suit is the result of activities of Respondent conducted between September 9, 1967 and December 13, 1967 in recovering the remains of a Spanish vessel that had sunk and come to rest about a half mile off the coast of Padre Island, Texas in 1554. The remnants of that vessel had rested undisturbed at that point for over 400 years, until September, 1967, when Respondent, an Indiana corporation, entered Texas waters in search of the treasure that legend had attributed to many of the sunken Spanish galleons off the Texas coast.

Operating without a permit to do business in Texas, and without notice to the State of Texas, Respondent began its treasure hunt. Its divers first removed the four-to-ten-foot layer of sand that had covered the artifacts and maintained their state of equilibrium; they then brought the artifacts to the surface. These operations continued until State officials and the public

learned of Respondent's looting of this valuable archeological treasure in the Texas tidelands; on December 13, 1967, the State of Texas filed suit in the 28th Judicial District Court of Kenedy County, Texas, to enjoin Respondent from further operations on the sunken vessel and to require the return of artifacts already removed by it. Thereupon, Respondent's unauthorized activities in Texas came to a halt. Recovery of the artifacts was eventually resumed and completed by the State, under supervision of the State Antiquities Committee. By August, 1969, all artifacts recovered were located within the Western District of Texas.

On August 6, 1969, nearly 20 months after completion of its recovery operation, Respondent filed suit in the United States District Court for the Southern District of Texas, Brownsville Division, for title to the artifacts in question, or, alternatively, for recovery of the reasonable value of its services. That case was ultimately decided by the ruling of the Fifth Circuit Court of Appeals that the District Court lacked jurisdiction to hear the case. *Platoro Limited, Inc. v. The Unidentified Remains of a Vessel*, 508 F.2d 1113 (5th Cir. 1975), rev'g 371 F.Supp. 356 (S.D. Tex. 1973). The items in question had been entirely removed to the Western District of Texas before Respondent filed its suit. Thus, the United States District Court for the Southern District of Texas lacked jurisdiction to hear the case. After remand, that Court dismissed Respondent's suit on May 17, 1975.

Over one year later, on May 21, 1976, Respondent filed suit in the United States District Court for the Western District of Texas, Austin Division, asserting a cause of action identical to that previously asserted in the Southern District of Texas. Again, however, Respondent's suit was dismissed. Pursuant to the State's Motion to Dismiss, the District Court found that Respondent's action, although an *in rem* action nominally against items of property, was barred by the Eleventh Amendment -- as owner of all the artifacts

recovered by Respondent in the Texas tidelands, the State was the real defendant in interest. Because the State had not given its consent to be sued, the court dismissed the action on that basis and found it unnecessary to rule on the State's claim that the statute of limitations had already run at the time that suit was filed. A judgment of dismissal was filed on August 13, 1976. Respondent did not appeal.

After a ten-month hiatus in litigation, Respondent returned to the Western District and filed this suit on June 23, 1977, pursuant to Rule 9(h), Federal Rules of Civil Procedure, and Rules C(2) and E(3)(a), Supp. Rules for Certain Admiralty and Maritime Claims. The cause of action, parties and property were identical to those in the two previous suits. The only difference of substance was that the State of Texas had waived the defense of sovereign immunity and granted consent for Respondent to sue. Consent was granted by House Concurrent Resolution No. 117, 65th Legislature, signed by the Governor on May 27, 1977. That Resolution included the following provisions:

> RESOLVED, That nothing in this resolution may be construed as an admission by the State of Texas, or by any of its employees, agents, departments, agencies, or political subdivisions of liability or of the truth of any allegation asserted by the claimant [Platoro], but the alleged cause of action must be proved under the laws of this state as in other civil suits; and, be it further
>
> RESOLVED, That nothing in this resolution may be construed as a waiver of any defense, of law or fact, available to the State of Texas or to any of its employees, agents, departments, agencies, or political subdivisions, but every defense is specifically reserved.

The State thus specifically reserved all defenses of law

or fact, including its right to assert defenses based upon the statute of limitations, as well as defenses of a substantive and jurisdictional nature. A copy of the Resolution is attached as an Appendix hereto.

On July 18, 1977, the State of Texas filed a Motion to Dismiss for lack of jurisdiction over the subject matter and for failure to state a claim on which relief could be granted. The State asserted that: (1) Respondent's claim of title to the artifacts was barred by the doctrine of res judicata; (2) alternatively, title to the artifacts rested with the State as a matter of substantive law; (3) Respondent's claim for salvage was barred by the statute of limitations; and (4) Respondent's claim for salvage was not properly within the court's admiralty and maritime jurisdiction in that no "marine peril" was shown.

At oral argument of the motion, Respondent's counsel announced that Respondent no longer wished to press its claim for title to the property, but was proceeding solely on its claim for compensation for alleged salvage services. On November 14, 1977, the District Court entered its Memorandum and Order dismissing Respondent's suit for failure to state a claim on which relief could be granted. The district court reaffirmed the decisions made in both previous cases that title to the artifacts rested with the State of Texas, and ruled that Respondent's claim for salvage services was barred by the two-year limitations period set out in 46 U.S.C. §730. Having decided that Respondent's action was barred by limitations, the court expressly found it unnecessary to discuss whether Respondent's complaint stated a salvage claim within the court's admiralty and maritime jurisdiction.

On April 4, 1980, the Court of Appeals for the Fifth Circuit reversed the decision of the trial court, holding that Respondent's action was not barred by limitations, and, further, that Respondent's complaint stated a claim within the court's admirality and maritime

jurisdiction. On May 8, 1980, the State's Petition for a rehearing on Banc was denied.

The State of Texas now files this Petition for Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

I.

46 U.S.C. §730 provides that no action for the recovery of remuneration for salvage services shall be maintained "if brought later than two years from the date when such . . . salvage was rendered." 46 U.S.C. §730. Exception is made only in the event there was no opportunity during such period to arrest the salvaged vessel "within the jurisdiction of the court within the territorial waters of the country in which the libelant resides or has his principal place of busines." Thus, commencement of the limitations period pursuant to 46 U.S.C. §730 contrasts with the frequent commencement of limitations periods on the date when "the cause of action accrues," *see, e.g.*, 28 U.S.C. §2401 and 49 U.S.C. §16, and tolling applies only in the circumstances specified.

In the instant proceeding, Respondent did not file suit until some nine and one-half years after the termination of its salvage operations off the coast of Texas. Its first action was filed in the Southern District of Texas on August 6, 1969, nearly 20 months after completion of its recovery operations on December 13, 1967. Its second suit was filed on May 21, 1976, almost eight and one-half years after completion of recovery operations, and over one year after the final dismissal of its first suit on May 17, 1975. The present action was filed on June 23, 1977, more than nine and one-half years after completion of recovery operations, and over 10 months after dismissal of the second suit. This action is clearly outside the two-year limitations period provided by 46 U.S.C. §730. Nonetheless, the Fifth Circuit Court of Appeals held that Respondent's suit was not barred by limitations

even though it simultaneously recognized that Respondent did not "come within the above-quoted language of the tolling provision of the statute." 614 F.2d at 1054.

The District Court in its Memorandum and Order clearly and correctly addressed the question of the proper application of 46 U.S.C. §730 in the present case:

> It is clear to the Court that Plaintiff cannot place within itself the literal wording of §730's tolling provision. The recovered items were within the Western District of Texas since at least August 5, 1969, and of course at all times were subject to the jurisdiction of some federal court. Thus it is clear that there was an opportunity to "arrest" the salved goods within two years after the rendition of any salvage services. That a suit may not have been maintainable during that period because of a sovereign immunity defense on the part of the other claimant does not mean that the goods could not have been arrested, just as the presence of an affirmative defense does not affect the validity of process in an ordinary civil suit. Similarly, even assuming that the pendency of the two prior federal suits might in some manner have tolled limitations, it is clear that for a total of some 42 months since the cessation of salvage operations and prior to the filing of this suit, there was no suit pending with regard to these matters. Moreover, the Brownsville suit, the only one filed within the two-year limit, was filed in a court lacking jurisdiction. Consequently, the only way Plaintiff could hope to avoid limitations is simply to argue that limitations started running only after the State gave its consent to suit. Even then, Plaintiff did not actually seek the State's consent until many years after the end of salvage operations.

> While Plaintiff's arguments might have considerable merit if an equitable theory of laches were being applied, this Court does not feel that it is in a position to ignore the literal wording of a Congressional statute. 46 U.S.C. §730 states that the limitations period begins to run "from the date when such assistance or salvage was rendered" and contains its own tolling provision which, as noted, is inapplicable to Plaintiff.

Significantly, the limitations period of 46 U.S.C. §730 begins to run "from the date when such assistance or salvage was rendered." Commencement of the limitations on the date when assistance or salvage services were rendered contrasts with the frequent commencement of limitations periods on the date when "the cause of action accrued." *See, e.g.*, 15 U.S.C. §15b; 28 U.S.C. §2401; 45 U.S.C. §56; 49 U.S.C. §16. The Supreme Court has noted the significance of such a distinction in another context:

> [I]f Congress had intended that the cause of action of the shipper to recover damages for unreasonable charges should accrue when the shipment was received, or when it was delivered by the carrier, we cannot doubt that a simple and obvious form for expressing that intention would have been used, instead of the expression 'from the time the cause of action accrues.' And in this connection we cannot fail to recognize that when the statute was enacted the time when a cause of action accrues had been settled by repeated decisions of this court to be when a suit may first be legally instituted upon it . . . and, since no clearly controlling language to the contrary is used, it must be assumed that Congress intended that this familiar expression should be given the well understood meaning which had been given to it by this court.

Louisville Cement Company v. Interstate Commerce Commission, 246 U.S. 638, 644 (1918). In 46 U.S.C. §730 Congress did adopt a "simple and obvious form of expression" to indicate its intention that the period of limitation should begin to run on "the date when such assistance or salvage was rendered," rather than on the date "when a suit may first be legally instituted." The language of Congress is specific and controlling. As the court noted in *People of the Living God v. Star Towing Co.*, 289 F.Supp. 635 (E.D. La. 1978):

> There has been no tendency on the part of the judiciary to erode the plain meaning of this statute [46 U.S.C. §730]. It is clear that a party may not be brought into court to defend a claim for salvage after the two-year statute of limitations has run. Tice Towing Line v. James McWilliams Blue Line, 57 F.2d 183 (2d Cir. 1932); Cavanaugh v. The Lenco II, 102 F.Supp. 213 (S.D.N.Y. 1959); Canadian Government Merchant Marine v. Virginia Coaling Corp., 1929 A.M.C. 192 (E.D.N.Y. 1929).

289 F.Supp. at 638.

This is hardly a case in which either the State of Texas or the federal courts have denied Respondent the opportunity to remedy the numerous jurisdictional defects in its various cases. On the contrary, Respondent has been on notice of the State's claim of sovereign immunity as well as every other jurisdictional objection for many years. Respondent simply determined to bypass the Legislature in hopes the federal courts would provide a more responsive forum. This was a conscious decision by Respondent, made with the advice of counsel, and Respondent should not now be heard to complain of its own failure to seek legislative permission to sue the State within the limitations period of 46 U.S.C.730.

The decision of the Fifth Circuit Court of Appeals

herein determines an important question of federal law affecting the administration of justice in the federal courts that has not been, but should be, settled by this Court.

II.

In its Memorandum and Order of November 14, 1977, the District Court wrote: "Having decided that Plaintiff's action is barred by limitations, the Court need not discuss the question of 'marine peril.' " Its decision on the limitations question established conclusively that Respondent could not recover under any set of facts; the question of marine peril was therefore irrelevant. The Fifth Circuit Court of Appeals nonetheless proceeded to determine the issue, finding that Resondent's claim properly invoked the district court's admiralty jurisdiction. It repudiated its finding in its earlier decision, *Platoro Limited, Inc. v. The Unidentified Remains of a Vessel, supra*, that the artifacts in question were "impervious to weather conditions above the surface of the sea" and that the "same prevent[ed] deterioration under water," on the basis that the court at that time had not addressed the issue whether a marine peril existed for purposes of determining if Plaintiff presented a valid salvage claim. 614 F.2d at 1055, fn.8.

Neither Respondent nor Petitioner disputes the necessity of showing a "marine peril" in order to present a valid salvage claim. This necessity was clearly established in *Legnos v. M/V Olga Jacob*, 498 F.2d 666 (5th Cir. 1974). However, inasmuch as the District Court herein specifically reserved ruling on that issue in its Memorandum and Order, that issue was not before the Fifth Circuit Court of Appeals for decision. The only issue before that Court was whether or not Respondent was entitled to proceed with its claims for remuneration - that is, whether or not they were barred by limitations - not whether or not Respondent would ultimately prevail thereon. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). Having decided that Respondent's claim was not barred

by limitations, and that Respondent was entitled, therefore, to proceed with its suit, the Court of Appeals needed proceed no further. It had reviewed the only issue determined by the trial court.

Only in exceptional cases does a Court of Appeals consider questions not ruled upon by a District Court. *Govero v. Standard Oil Co.*, 192 F.2d 962 (8th Cir. 1951). As a general rule, a matter not disposed of in the trial court is not before the appellate court for review. *Bergin v. Kiron State Bank*, 145 F.2d 189 (8th Cir. 1944). *See Lazier v. United States*, 170 F.2d 521 (8th Cir. 1948):

> The District Court ruled against the taxpayer on the ground that the loss was not a "net operating loss.". . .
>
> The sole question for decision by this Court, is whether the loss sustained by the taxpayer in 1943 was a "net operating loss" which could be carried back. Certain procedural questions are argued in the briefs, but they were not ruled upon by the District Court and are therefore not properly before this Court.

170 F.2d at 522. This is in accordance with the well-established rule that an appellate court, in reviewing a judge-tried case, will not substitute its judgment for that of the district court, but may reverse "only where, upon a consideration of the entire record, [it is] 'left with a definite and firm conviction that a mistake has been committed.' " *O'Connor v. Vernore Transportation Co.*, 353 F.2d 324 (1st Cir. 1965), citing *McAllister v. United States*, 348 U.S. 19 (1954). A mistake is not made where there has been no ruling; in light of the trial court's decision on the question of limitations herein, it was unnecessary that the court rule on the question of "marine peril". Likewise, it was unnecessary that the Court of Appeals rule thereon. The question of marine peril encompasses extensive evidentiary matters, *see, e.g., Joncich v. Xitco*, 172 F.2d 1003 (9th Cir. 1949), and

Conolly v. S.S. Karina II, 302 F.Supp. 675 (E.D. N.Y. 1969), that were not, but should be, determined by the trial court. The decision in *Treasure Salvors, Inc. v. The Unidentified Wrecked and Abandoned Sailing Vessel*, 569 F.2d 330 (5th Cir. 1978), relied upon by the Court of Appeals as the basis for its decision, cannot dispose of such matters absent the required findings by the trial court.

The decision by the Fifth Circuit Court of Appeals herein has so far departed from the accepted and usual course of judicial proceedings as to necessitate an exercise of this Court's power of supervision.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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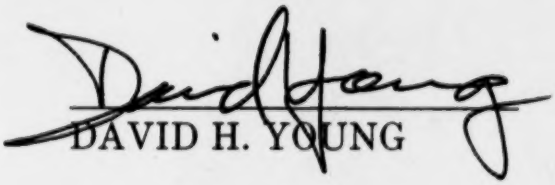
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I, David H. Young, Assistant Attorney General of Texas, do hereby certify that three true and correct copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit have been served upon attorney for Respondent by placing same in the United States mail, certified, return receipt requested, addressed to Mr. Jack Sanchez, O'Leary, Sanchez, & Benton, P.C., P.O. Box 4215, Brownsville, Texas 78520, on this the 6 day of August, 1980.



DAVID H. YOUNG

APPENDIX

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

PLATORO LIMITED, INC.	§	
	§	
V.	§	CIVIL ACTION NO.
	§	A-77-CA-112
	§	
THE UNIDENTIFIED	§	
REMAINS OF A VESSEL	§	

MEMORANDUM AND ORDER

This is a suit in admiralty to gain title to, or alternatively to recover monetary compensation for the salvage of, certain items recovered from the shipwreck of a Spanish galleon off the coast of Padre Island. On November 4, 1977, the Court heard oral arguments on the motion of the State of Texas, a claimant, to dismiss the suit. After considering the motion, pleadings, briefs, and arguments, the Court is of the opinion the motion to dismiss should be granted.

This suit has had a checkered history which must be set out to understand fully the posture of the case in this Court. The Spanish galleon involved sank off the coast of Padre Island in the 1550's. The wreck was soon covered by a layer of sand and silt. Plaintiff, an Indiana corporation, started recovery operations in September of 1967, and ceased on December 13, 1977, pursuant to a state court injunction. Plaintiff had apparently removed many of the recovered items to Indiana. The items were returned to Austin, Texas, by at least August 5, 1969, apparently pursuant to some sort of understanding between Plaintiff and the State of Texas that the parties would split the proceeds of the recovery 50-50. The Texas Land Commissioner then repudiated this understanding.

On August 6, 1969, Plaintiff filed suit in federal district court in Brownsville, Texas, making basically the same allegations as are made in this suit. That

district court ultimately rendered a judgment for Plaintiff, *Platoro Limited, Inc. v. The Unidentified Remains of a Vessel*, 371 F.Supp. 356 (S.D. Tex. 1973), but that judgment was later reversed for lack of *in rem* jurisdiction, 508 F.2d 1113 (5th Cir. 1975). The suit was then dismissed at the direction of the 5th Circuit on May 17, 1975.

In its opinion the 5th Circuit intimated that sovereign immunity might be a bar to the suit, 508 F.2d 1115 at n.3, and apparently taking this warning to heart, Plaintiff says it sought permission to sue from the next session of the Texas legislature, but was not successful. This first attempt to obtain a waiver of sovereign immunity would have occured some 7 1/2 to 8 years after the cessation of salvage operations in 1967. On May 21, 1976, Plaintiff filed suit in this court (Civil Action No. A-76-CA-99), making the same allegations as made in the Brownsville suit and as are made in the present suit. This Court confirmed Plaintiff's fears and dismissed for failure of the State to consent to suit. Memorandum Order of August 13, 1976. No appeal was taken from that dismissal.

Plaintiff approached the following session of the state legislature and obtained a resolution, signed by the governor on May 27, 1977, authorizing suit, but expressly reserving all defenses other than that or sovereign immunity. The instant suit was then filed on June 23, 1977.

The State characterizes this suit as one in which Plaintiff is 1) suing for a declaration of title to the property recovered or, alternatively, 2) for an award for salvage services, to be secured by a maritime lien. Plaintiff says that it is not seeking a judgment of present ownership or "present title," but is only seeking an "award" of title as part of its salvage claim. Alternatively it seeks the monetary award for salvage services.

The State has moved to dismiss for failure to state a

claim or for lack of jurisdiction in admiralty. The State contends that the title issue is res judicata because of the earlier Brownsville and Austin suits. Alternatively it says that the prior statements by this Court and the Brownsville court to the effect that title to the recovered goods was in the State were correct as a matter of substantive law. As to the salvage claim, the State argues that the suit is barred by the 2-year statute of limitations in 46 U.S.C. § 730, or if not barred, that there is no jurisdiction because of a failure to allege (or be able to prove) "mairtime peril," which is said to be an element of a slavage claim.

The "Title" Claim:

The Court need not devote much attention to the title question inasmuch as Plaintiff's counsel, during argument, expressly disavowed any claim to title and said Plaintiff was pursuing only its claim for a monetary salvage award. We note only that the disagreement between the parties concerning how to characterize the title claim appears to result from two distinct lines of cases on this type of situation. One line awards title to items recovered from an abandoned shipwreck to the first person to take possession of the goods, applying a "finders" theory. The other line of cases treats a wrecked or sunken ship as a "derelict" or "wreck of the sea" which, upon recovery, belongs to the sovereign unless claimed by the true owner within a year and a day. *See* 63 A.L.R.2d 1360. This Court has already indicated, although perhaps only in dictum, that it feels that the latter line of cases applies to the facts alleged by Plaintiff.

The "Salvage" Claim:

46 U.S.C. § 730 states that a "...suit for the recovery of remuneration for rendering assistance of salvage services shall not be maintainable if brought later than two years from the date when such assistance or salvage was rendered. . . ."The statute contains its own tolling provision which provides that the suit may be brought

after two years if ". . .during such period there had not been any reasonable opportunity of arresting the. . .salved vessel withih the jurisdiction of the court. . . ."

We note initially that "46 U.S.C. § 730 is a federal statute of limitations which contains its own tolling provisions" and that "[t]here has been no tendency on the part of the judiciary to erode the plain meaning of this statute." *People of the Living God v. Star Towing Co.*, 289 F.Supp. 635, 638-39 (E.D. La. 1968)(order of quotations reversed). *See also Basic Boats, Inc. v. United States*, 311 F.Supp. 596 (E.D. Va. 1970); *Tice Towing Line v. James McWilliams Blue Line*, 57 F.2d 183 (2d Cir. 1932); *Cavanaugh v. The Lenco II*, 102 F. Supp. 213 (S.D. N.Y. 1951); *Canadian Government Merchant Marine v. Virginia Coaling Corp.*, 1929 A.M.C. 192 (E.D. N.Y. 1929).

It is clear to the Court that Plaintiff cannot place itself within the literal wording of § 730's tolling provision. The recovered items were within the Western District of Texas since at least August 5, 1969, and of course at all times were subject to the jurisdiction of some federal court. Thus it is clear that there was an opportunity to "arrest" the salved goods within two years after the rendition of any salvage services. That a suit might not have been maintainable during that period because of a sovereign immunity defense on the part of the other claimant does not mean that the goods could not have been arrested, just as the presence of an affirmative defense does not affect the validity of process in an ordinary civil suit. Similarly, even assuming that the pendency of the two prior federal suits might in some manner have tolled limitations, it is clear that for a total of some 42 months since the cessation of salvage operations and prior to the filing of this suit, there was no suit pending with regard to these matters. Moreover, the Brownsville suit, the only one filed within the two year limit, was filed in a court lacking jurisdiction. Consequently, the only way Plaintiff could hope to avoid limitations is simply to argue that limitations started

running only after the State gave its consent to suit. Even then, Plaintiff did not actually seek the State's consent until many years after the end of salvage operations.

While Plaintiff's arguments might have considerable merit if an equitable theory of laches were being applied, this Court does not feel that it is in a position to ignore the literal wording of a Congressional statute. 46 U.S.C. § 730 states that the limitations period begins to run "from the date when such assistance or salvage was rendered" and contains its own tolling provision which, as noted, is inapplicable to Plaintiff.

Commencement of the limitation period on the date when assistance or salvages services were rendered contrasts significantly with the frequent commencement of limitations periods on the date when the "cause of action accrued." Indeed most, if not all, of the cases cited by Plaintiff for the proposition that limitations does not begin to run in favor of the sovereign until the sovereign consents to suit involve limitation statutes using the "accrual" language. *See, e.g., United States v. Fuston*, 143 F.2d 76 (10th Cir. 1944); *Walker v. State*, 103 S.W.2d 404 (Tex. Civ. App. -- Waco 1937, no writ). The Supreme Court has noted the importance of such a difference in wording of the limitations statute in another context:

> "[I]f Congress had intended that the cause of action of the shipper to recover damages for unreasonable charges should accrue when the shipment was received, or when it was delivered by the carrier, we cannot doubt that a simple and obvious form for expressing that intention would have been used, instead of the expression 'from the time the cause of action accrues.' " *Louisville Cement Co. v. Interstate Commerce Comm'n*, 246 U.S. 638, 644 (1918).

The Court feels that in 46 U.S.C. § 730 Congress did adopt a "simple and obvious form of expression" to

indicate its intention that the period of limitations should begin to run from the date of rendition of services,and not from the date a suit might first be legally instituted. The language of Congress is specific and controlling; it is not for this Court to ignore it.

Having decided that Plaintiff's action is barred by limitations, the Court need not discuss the question of "marine peril."

It is accordingly

ORDERED that the State's motion to dismiss be GRANTED, and that this suit be DISMISSED for failure to state a claim upon which relief can be granted.

Entered this *14* day of November, 1977, at Austin, Texas.

/s/

JACK ROBERTS
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF TEXAS - AUSTIN DIVISION

CIVIL ACTION FILE NO. A-77-CA-112

PLATORO LIMITED, INC.	§	
	§	
vs.	§	JUDGMENT
	§	
The unidentified remains of a vessel, her cargo, apparel, tackle, and furniture, in a cause of salvage, civil and maritime	§	

This action came on for trial (hearing) before the Court, Honorable Jack Roberts, United States District Judge, presiding, and the issues having been duly tried (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that State's motion to dismiss be, GRANTED, and that this suit be DISMISSED for failure to state a claim upon which relief can be granted.

Dated at AUSTIN, Texas, this 14th day of November, 1977.

DAN W. BENEDICT

Clerk of Court

/s/

Wanda V. Peterson,
Deputy Clerk

PLATORO LTD., INC. v. UNIDENTIFIED REMAINS, ETC.
Cite as 614 F.2d 1051 (1980)

PLATORO LIMITED, INC.,
Plaintiff-Appellant,

v.

The UNIDENTIFIED REMAINS OF A VESSEL,
her cargo, apparel, tackle, and furniture, in
a cause of salvage, civil and maritime, Defendant-Appellees.

No. 1052.

United States Court of Appeals,
Fifth Circuit.

April 4, 1980

April 4, 1980.

Rehearing and Rehearing En Banc
Denied May 8, 1980.

Salvage company appealed from judgment entered by the United States District Court for the Western District of Texas, Jack Roberts, Chief Judge, dismissing its suit in rem to obtain title to unidentified remains of Spanish vessel abandoned over 400 years earlier and resting on bottom of Gulf of Mexico, or seeking reasonable compensation for salvage services in recovering the vessel. The Court of Appeals, Ainsworth, Circuit Judge, held that: (1) circumstances favored tolling two-year statute of limitations for suit for recovery of remuneration for rendering salvage services, and (2) "marine peril" existed in the abandoned Spanish vessel, and thus complaint stated claim for compensation cognizable within admiralty and maritime jurisdiction of district court.

Reversed and remanded.

Jack D. Sanchez, Brownsville, Tex., for plaintiff-appellant.

John L. Hill, Atty. Gen., Paul B. Gavia, Connie Ode, Asst. Attys. Gen., Austin, Tex., for defendants-appellees.

Appeal from the United States District Court for the Western District of Texas.

Before AINSWORTH and HENDERSON, Circuit Judges, and HUNTER,* District Judge.

AINSWORTH, Circuit Judge:

Plaintiff Platoro Limited, Inc. appeals from a judgment of the United States District Court for the Western District of Texas dismissing its suit *in rem* to obtain title to the unidentified remains of a Spanish vessel abandoned over 400 years earlier (in 1554) and resting on the bottom of the Gulf of Mexico off the coast of Padre Island, Texas. Alternatively, plaintiff sought reasonable compensation for salvage services in recovering the vessel. Plaintiff requested issue of process against the State of Texas pursuant to a resolution of the Texas Legislature which authorized suit against it. The court held that plaintiff's suit was barred by the applicable statute of limitations and granted the State of Texas' motion to dismiss. We reverse and remand.

On September 11, 1967, Platoro, an Indiana corporation, commenced operations for recovery of the remains of a 16th century Spanish ship which was found buried under a layer of sand in 30-40 feet of water in the Gulf of Mexico.[1] Thereafter, on December 13, 1967, the

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*District Judge of the Western District of Louisiana, sitting by designation.

[1]The State of Texas points out in its brief that Platoro commenced recovering the artifacts in question "without a permit to do business

State of Texas filed suit in the 28th Judicial District Court of Kenedy County, Texas, to enjoin Platoro from further recovery operations. The injunction was issued on December 31 and Platoro ceased all activities. Negotiations between Platoro and the Texas Land Commissioner followed and a settlement was reached whereby Platoro and the Commissioner agreed to divide the artifacts recovered. Pursuant to the agreement, Platoro returned the artifacts from Indiana to state custody in Texas.

On August 6, 1969, approximately 19 months after its operations had ceased, and upon realizing that the State was not going to honor its agreement with the

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in Texas, without a permit to explore or excavate an archeological site, and without any notice to the State of Texas." However, the Texas Antiquities Code, Tex.Rev.Civ.State.Ann. art. 6145-9 (Vernon), which deals explicitly with the State's requirement for salvaging vessels abandoned at sea, had not been enacted at the time Platoro engaged in its salvaging operations.

Texas also argues that Platoro violated Tex.Pen.Code Ann. art. 147b (Vernon)(repealed 1969) by failing to obtain a permit or license to explore or excavate "in or on any prehistoric ruins or archeological or vertebrate paleontological site in Texas," and Tex.Bus.Corp.Act. Ann. art. 8.01 (Vernon), by failing to obtain a certificate to transact business in the State of Texas. Whether appellant's activities were in violation of the Texas Penal Code is irrelevant to the issues involved here.

With regard to Platoro's failure to obtain a certificate to transact business in Texas, appellant may reasonably have assumed that such a certificate was not necessary considering the nature of its activities and the fact that they took place off the coast of Texas. Nonetheless, subsequent to the seizure of the artifacts by the State, Platoro filed for a Certificate of Authority to transact business in Texas, which was granted in 1969 and is still in force.

Moreover, Platoro's failure to obtain the above permits prior to commencing its salvaging activities does not prohibit it from seeking compensation in this case.

Commissioner, Platoro filed an *in rem* action in federal court in the Southern District of Texas to obtain title to the artifacts recovered or, alternatively, reasonable compensation for salvage services. The district court held that plaintiff Platoro was entitled to compensation for its salvaging operations and awarded judgment in the amount of $131,248. *Platoro Limited, Inc. v. The Unidentified Remains of a Vessel*, 371 F.Supp. 356 (S.D.Tex. 1973). On appeal, this court reversed the judgment on the ground that the district court lacked *in rem* jurisdiction, since the artifacts were not lacked within the Southern District of Texas when the suit was filed.[2] *Platoro Limited, Inc. v. The Unidentified Remains of a Vessel*, 508 F.2d 1113 (5th Cir. 1975). The court remanded the case to the district court to dismiss the suit, which it did on May 17, 1975.

In a footnote to its opinion, this court also noted that the "proceeding raises serious Eleventh Amendment questions." *Id.* at 1115 n.3. Platoro, therefore, attempted to obtain permission from the State of Texas at the next legislative session to bring suit against it. Its efforts were unsuccessful, so on May 21, 1976 it again filed suit against the State of Texas, in federal court in the Western District of Texas, alleging the same claims which were set forth in the prior suit. On August 13, 1976, the district court dismissed the suit based on the eleventh Amendment's bar to the court's jurisdiction, since the State had failed to waive sovereign immunity.

At the next session of the Texas Legislature, Platoro succeeeded in obtaining a waiver of sovereign immunity by virtue of a resolution which was signed by the

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[2]Although the sunken vessel was buried in territorial waters within the Southern District of Texas and the salvaging operations took place there prior to the time suit was brought, Platoro had removed the artifacts recovered to date to its home office in Indiana and later, pursuant to an agreement with the State of Texas, had relinquished possession of them to Texas which has continually held them in Austin in the Western District of that state.

Governor on May 27, 1977. This suit was then commenced on June 23, and on July 18, the State of Texas moved to dismiss plaintiff's complaint for lack of jurisdiction over the subject matter and for failure to state a claim on which relief could be granted.[3] In its motion, the State asserted, among other things, that Platoro's complaint failed to state a claim for remuneration for salvage services within the court's admiralty and maritime jurisdiction; also that the claim was barred by the applicable statute of limitations, 46 U.S.C. §730.[4] The district court held that Platoro's actions was barred by the two-year limitation period set out in section 730, and thus expressly found it unnecessary to decide whether plaintiff's complaint stated a salvage claim within the court's admiralty and maritime jurisdiction. Accordingly, on November 14, 1977, the district court dismissed plaintiff's suit and plaintiff brought this appeal.

The pertinent statutory provision, 46 U.S.C. § 730, establishes a two-year limitation period for suits for the recovery of remuneration for rendering salvage services, which period runs from the date the services were rendered. The statute contains a proviso, however,

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[3]When the motion was orally argued, plaintiff Platoro's counsel stated that it was proceeding solely on its claim for compensation for salvage services, and no longer asserted a claim of title to the property.

[4]46 U.S.C. § 730 states:

> A suit for the recovery of remuneration for rendering assistance or salvage services will not be maintainable if brought later than two years from the date when such assistance or salvage was rendered, unless the court in which the suit is brought shall be satisfied that during such period there had not been any reasonable opportunity of arresting the assisted or salved vessel within the jurisdiction of the court or within the territorial waters of the country in which the libelant resides or has his principal place of business.

that suit may be brought after two years if "during such period there had not been any reasonable opportunity of arresting the . . . salved fessel within the jurisdiction of the court." The action which precipitated this appeal was not commenced until July 1977, more than nine years after the salvage services were rendered. The artifacts made the subject of the suit were physically within the Western District of Texas at Austin since 1969 when plaintiff brought them there from Indiana. Thus, Platoro does not come within the above-quoted language of the tolling provision of the statute.

Nevertheless, the mere fact that a federal statute providing for substantive relief also sets a time limitation upon the institution of suit under the statute does not restrict the power of the federal courts to hold the statute of limitations is tolled under certain circumstances not inconsistent with the legislative purpose. *American Pipe and Construction Co. v. Utah*, 414 U.S. 538, 559, 94 S.Ct. 756, 769, 38 L.Ed. 713 (1974); *Leake v. University of Cincinnati*, 605 F.2d 255, 259 (6th Cir. 1979); *cf. Mizell v. North Broward Hospital District*, 427 F.2d 468 (5th Cir. 1970). Judicial power to toll statutes of limitations on equitable grounds was firmly established in *Burnett v. New York Central Railroad*, 380 U.S. 424, 85 S.Ct. 1050, 13 L.Ed.2d 941 (1965). *Burnett* involved the dismissal for improper venue of an action filed in state court under the Federal Employers' Liability Act. At the time suit was later commenced in the proper district but in federal court, the limitations period established by the Act had already run. The Court noted that the period is not totally inflexible, but under appropriate circumstances may be extended. The basic question is whether tolling the statute in a particular case is in keeping with the legislative intent underlying the Act itself. 380 U.S. at 426, 85 S.Ct. at 1053. In noting that statutes of limitations are designed primarily to assure fairness to defendants by preventing the revival of claims that have been allowed to slumber until evidence has been lost and witnesses

have disappeared, the Court pointed out that this "policy of repose" is frequently outweighed where "the interests of justice require the vindication of the plaintiff's rights." 380 U.S. at 428, 85 S.Ct. at 1054-55.

Tolling of the statute of limitations under the circumstances here is warranted to allow Platoro an opportunity properly to pursue its claim on the merits. Here, the vessel from which the artifacts were retrieved was located in the Southern District of Texas at the time Platoro's first suit was instituted, and the recovery operations made the basis of the suit took place there. It was not unreasonable for Platoro to assume these facts were sufficient for a determination that the court had proper jurisdiction over the res. In fact, the district court so held, although erroneously. *Platoro Limited, Inc., supra,* 371 F.Supp. at 358-59. It would not be inconsistent with the legislative intent underlying the statute at issue to avoid the injustice that would result from the dismissal of Platoro's claim because it made an erroneous choice with regard to the true location of the subject matter of the suit.

Furthermore, filing of Platoro's first lawsuit showed "proper diligence on the part of the plaintiff which such statutes of limitation were intended to insure." *Goldlawr, Inc. v. Heiman,* 369 U.S. 463, 467, 82 S.Ct. 913, 916, 8 L.Ed.2d 39 (1962). Appellant was not dilatory in attempting to preserve its claim. After the State of Texas filed suit, Platoro negotiated an agreement with the State Land Commissioner to divide the artifacts. When it appeared that the State was not going to honor the agreement, appellant filed its suit well within the two-year period. When the decision in that case was reversed on appeal and this court noted that the proceeding raised serious Eleventh Amendment questions, Platoro apparently realized that a waiver of sovereign immunity would likely be necessary for a successful claim against the State. After failing to get a consent to suit resolution from the State at the next legislative session, Platoro filed suit once again in order

to protect its claim. After that action was dismissed, appellant successfully obtained a waiver of sovereign immunity from the Texas Legislature. Platoro brought the present suit within three weeks of the signing of the Texas Legislature resolution. At no time did a period of two years run without the intervention of legal action by appellant. Moreover, the State of Texas has been cognizant of this claim from almost the beginning. Texas initiated the controversy by filing suit for injunctive relief in 1967. At that time the State was aware that Platoro claimed compensation for salvaging the artifacts.

In the final balance, therefore, the circumstances favor tolling the statute of limitations and granting Platoro the right to have its claim adjudicated.[5]

We next consider the question whether Platoro's complaint states a claim for compensation for salvage services cognizable within the court's admiralty and maritime jurisdiction. The State of Texas argues that one of the elements of a salvage action -- the existence of a marine peril -- is absent from this controversy,[6] since the vessel has been "rest[ing] peacefully on the floor of the Gulf of Mexico for over 400 years," and is not

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[5]In view of our holding, we find it unnecessary to announce a broad rule regarding Platoro's contention that the statute of limitations did not begin to run until Texas gave its consent to suit. *See United States v. Fuston*, 143 F.2d 76 (10th Cir. 1944). Platoro's efforts to preserve its claim have operated in each instance to toll the statute sufficient to prevent a bar to maintaining its present suit.

[6]It is well established that in order to present a valid salvage claim three elements must be shown: "(1) a marine peril, (2) service voluntarily rendered when not required as an existing duty or from a special contract, and (3) success in whole or in part, or that the service rendered contributed to such success." *Legnos v. M/V Olga Jacob*, 498 F.2d 666, 669 (5th Cir. 1974). Texas complains that only the first of these elements is lacking.

"suffering from an impending peril of the sea." We disagree.

In a strikingly similar case, this court recently decided that a party claiming an award for the salvage of a vessel abandoned at sea could properly proceed under the court's admiralty jurisdiction. *Treasure Salvors, Inc. v. the Unidentified Wrecked and Abandoned Sailing Vessel*, 569 F.2d 330 (5th Cir. 1978). We said in that case that a "[m]arine peril includes more than the threat of storm, fire or piracy to a vessel in navigation."[7] *Id.* at 337. Thus, a marine peril existed in a wrecked and abandoned vessel, which sank in 1622 off the Marquesas Keys in waters off the Florida coast, and whose location was unknown for over 300 years. Further, the court said that this peril existed even after discovery of the location of the vessel, since it was "still in peril of being lost through the actions of the elements."[8] *Id.* at 337.

Our decision in *Treasure Salvors* is thus dispositive of the issue whether appellant properly invoked the court's admiralty jurisdiction in its claim for compensation

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[7]In a footnote, the court noted that " '[t]he peril required in a slavage service need not necessarily be one of imminent and absolute danger. The property must be in danger, either presently or reasonably to be apprehended.' " *Treasure Salvors, Inc. v. The Unidentified Wrecked and Abandoned Sailing Vessel*, 569 F.2d 330, 337 n.13 (5th Cir. 1978), *quoting* Norris, The Law of Salvage § 185 (1958).

[8]In our earlier statement that the vessel was resting on the bottom of the Gulf of Mexico, 30 to 40 feet under water, covered by 4 to 10 feet of sand, thus "impervious to weather conditions above the surface of the sea," with the "sand prevent[ing] deterioration underwater," *Platoro Limited, Inc. v. Unidentified Remains of a Vessel*, 508 F.2d 1113, 1114-15 n.1 (5th Cir. 1975), the court was not addressing the issue whether a marine peril existed for purposes of determining if plaintiff presented a valid salvage claim. Later, when we squarely considered the question in *Treasure Salvors, supra*, we determined that such conditions present a marine peril for purposes of meeting the requirements of a valid salvage action.

here.[9] We therefore hold that Platoro's complaint states a valid salvage claim and remand this case to the district court for a determination of the merits.

REVERSED AND REMANDED.

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[9]The State of Texas makes much of the fact that in *Treasure Salvors, supra*, the vessel was abandoned partially in international waters, whereas here the wreck lay in territorial waters off the Texas coast. This distinction, however, is not determinative of whether a marine peril existed for purposes of meeting the requirements of a salvage action.

THE STATE OF TEXAS

SECRETARY OF STATE

I, MARK WHITE, Secretary of State of the State of Texas DO HEREBY CERTIFY that the attached is a true and correct copy of House Concurrent Resolution Number 117, passed by the 65th Legislature, Regular Session, 1977, signed by the Governor on May 27, 1977, and filed in this office on May 28, 1977.

IN TESTIMONY WHEREOF, I have hereunto signed my name officially and caused to be impressed hereon the Seal of State at my office in the city of Austin, this

3rd *day of* June, *A.D. 1977*

/s/

Secretary of State

H.C.R. No. 117

HOUSE CONCURRENT RESOLUTION

WHEREAS, Platoro Limited, Incorporated, a foreign corporation authorized to transact business in the State of Texas, alleges that it recovered the remains of a vessel and its cargo, tackle, and furniture; and

WHEREAS, Platoro Limited, Incorporated, alleges that the State of Texas has taken possession of those remains without compensating Platoro Limited, Incorporated, for its expense in the salvage operation; now, therefore, be it

RESOLVED by the House of Representatives of the State of Texas, the Senate concurring, That Platoro Limited, Incorporated, is hereby granted permission to sue the State of Texas for whatever relief to which it may be entitled as a result of the state's taking possession of these remains; and, be it further

RESOLVED, That in the event suit is filed, service of citation and other required process be made on the Attorney General of the State of Texas, and that the suit be tried as other civil suits; and, be it further

RESOLVED, That nothing in this resolution may be construed as an admission by the State of Texas, or by any of its employees, agents, departments, agencies, or political subdivisions of liability or of the truth of any allegation asserted by the claimant, but the alleged cause of action must be proved under the laws of this state as in other civil suits; and, be it further

RESOLVED, That nothing in this resolution may be construed as a waiver of any defense, of law or fact, available to the State of Texas or to any of its employees, agents, departments, agencies, or political subdivisions, but every defense is specifically reserved.

-END-

/s/ /s/

President of the Senate Speaker of the House

I certify that H.C.R. No. 117 was adopted by the House on May 13, 1977, by a non-record vote.

/s/

Chief Clerk of the House

I certify that H.C.R. No. 117 was adopted by the Senate on May 20, 1977.

/s/

Secretary of the Senate

APPROVED: 27 May 1977

Date

/s/

Governor

NO 80-220

Supreme Court, U. S.
FILED
SEP 8 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE UNIDENTIFIED REMAINS OF
A VESSEL, ETC.,

Petitioner

VERSUS

PLATORO LIMITED, INC.,

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI

JACK SANCHEZ
O' Leary, Sanchez & Benton, P. C.
Post Office Box 4215
Brownsville, Texas 78520
(512) 526 - 3731

ATTORNEYS FOR RESPONDENT

QUESTIONS PRESENTED

1. Was the Court of Appeals correct in holding that 46 U.S.C. § 730 authorizes a foreign corporation to maintain, as against the State of Texas, an action pursuant to 46 U.S.C. §§ 721, et seq. for alleged salvage services rendered where such action was not instituted until some nine and one-half years after termination of the services in question?

2. Was the Court of Appeals correct in passing upon the issue of "marine peril" where such issue was expressly reserved from ruling by the District Court?

INTERESTED PARTIES

1. Platoro Limited, Inc., and its attorneys of record, O' Leary, Sanchez & Benton, P.C., P.O. Box 4215, Brownsville, Texas, 78520.

2. The State of Texas, by and through its Attorney General, the Honorable Mark White, and Connie Ode, Assistant Attorney General, P.O. Box 12548, Capitol Station, Austin, Texas, 78711.

INTERESTED PARTIES

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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

THE UNIDENTIFIED REMAINS OF
A VESSEL, ETC.,

Petitioner

VERSUS

PLATORO LIMITED, INC.,

Respondent

* * * * * *

RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI

Respondent, Platoro Limited, Inc., respectfully prays that this Court deny the issuance of a Writ of Certiorari to the Petitioner herein.

STATEMENT OF FACTS

The controversy made the basis of this suit has had a long and torturous history beginning with the commencement of the actual salvage operations by Platoro Limited, Inc. in September, 1967. Platoro began its recovery operations at a point in an easterly direction from Padre Island, Texas, the artifacts being located thirty to forty feet under the surface of the water, and buried in the ocean floor in ten to fifteen feet of sand. The salvage operations at the site began on or about September 11, 1967, and continued until December 31, 1967 when the 28th Judicial District Court for the State of Texas

issued a temporary restraining Order prohibiting Platoro from conducting further salvage operations. Negotiations then began between Platoro and Mr. Jerry Sadler, the then Texas Land Commissioner, and a settlement was arrived at whereby Platoro and Sadler agreed to a contract dividing the artifacts, which had been recovered up to that point in time, and providing for further recovery operations for the mutual benefit of both Platoro and The State of Texas. Pursuant to the agreement, the recovered artifacts were returned by Platoro from Indiana to Austin, Texas, after which, The State of Texas breached its agreement with Platoro and denied that Platoro had any right to the artifacts or goods whatsoever.

Thereafter, on August 6, 1969, Platoro filed an *in rem* suit in the Federal District Court for the Southern District of Texas, in which Platoro sought both title, or alternatively, a salvage reward for the recovery of the goods. On June 12, 1970, the District Court issued its Memorandum Opinion in which it held that Platoro's claim was a true salvage claim. After an unsuccessful interlocutory Appeal by The State of Texas, the District Court rendered a Judgment for Platoro, in ***Platoro Limited, Inc. v. The Unidentified Remains of a Vessel,*** 371 F. Supp. 356 (S. D. Tex. 1973). Judge Reynaldo G. Garza in that case found that the Court had both *in rem* and subject matter jurisdiction over Platoro's claim and awarded a salvage award to Platoro in the amount of $131,248.00. The State of Texas appealed the District Court's Judgment on several grounds, and the Fifth Circuit reversed the lower Court on the grounds that the District Court lacked *in rem* jurisdiction since the artifacts were not within the confines of the Southern District of Texas at the time suit was filed. ***Platoro Limited, Inc. v. The Unidentified Remains of a Vessel***, 508 F. 2d 1113 (5th Cir. 1975).

In a footnote of the Fifth Circuit's Opinion, it was noted that although the issue was not extensively briefed, the "proceeding raises serious Eleventh Amendment questions."

Id. at 1115. Platoro, taking this caveat to heart, attempted to attain the permission of The State of Texas in order to bring suit in the Western District of Texas, where the artifacts were located. Such permission was denied from the 64th Legislature of The State of Texas; however, despite such refusal, Platoro Limited, Inc. again filed suit on May 21, 1976 in Civil Action No. A-76-CA-99 in the Western District of Texas, Austin Division. On August 13, 1976, that lawsuit was dismissed on a plea of sovereign immunity by The State of Texas.

At the next available session of the Legislature, i.e., the 65th Legislature, Platoro Limited, Inc. again attempted to obtain the State's permission to bring suit, and on this occasion was successful. Consent was granted by House Concurrent Resolution No. 117, 65th Legislature, signed by the Governor on May 27, 1977.

The suit upon which present appeal is based was filed by Platoro on June 23, 1977.

On July 18, 1977, the State of Texas filed a Motion to Dismiss for lack of jurisdiction over the subject matter, and for failure to state a claim on which refief could be granted.

On November 14, 1977, the District Court entered its Memorandum and Order dismissing Platoro's suit for failure to state a claim on which relief could be granted. Specifically, the Court held that Platoro's action was barred by the two years' limitations, set out in 46 U.S.C. §730. Platoro, therefore, appealed the decision of the District Court on the basis that Platoro's claim for salvage services was not barred by the limitations period contained in 46 U.S.C. §730. The State of Texas responded to Platoro's point of error, and additionally, presented for review to the Fifth Circuit, the issue as to whether Platoro rendered "salvage services" within the Court's admiralty and maritime jurisdiction.

On April 4, 1980, the Court of Appeals for the Fifth Circuit reversed the decision of the trial court, and held that Platoro's action was not barred by limitations, and, further, that Platoro's complaint stated a claim within the court's admiralty and maritime jurisdiction. On May 8, 1980, the State's Petition for a rehearing on Banc was denied.

Platoro Limited, Inc. now files this its Brief in Opposition to the Petition for Writ of Certiorari filed by the State of Texas.

REASONS FOR DENYING THE WRIT

I.

The legal issues raised by the Petitioner do not reach the threshold of importance which would necessitate consideration by The Supreme Court of the United States.

II.

Platoro would first point out that there has been no lack of diligence on its part in pursuing its claim in this matter. As can be seen from the foregoing Statement of Facts, the State of Texas was very well aware of the fact that Platoro was engaging in salvage operations and was necessarily expecting to receive a salvage award. In fact, the suit for injunctive relief filed on December 13, 1967 in the 28th Judicial District Court of Kenedy County, Texas, was initiated by the State of Texas. thereafter, when the State of Texas breached its agreement with Platoro, Platoro filed suit in the District Court for the Southern District of Texas. That suit was pending in the District Court from August 6, 1969 until May 17, 1975, when suit was dismissed for want of jurisdiction as per the mandate of the Circuit Court of Appeals. Thereafter, Platoro sought to press its claim for salvage award bv filing suit in the Western District of Texas, as well as concurrently attempting to secure premission from the Legislature to file suit against the State. When Platoro finally did secure such permission, the instant suit was immediately filed. There has never been any lack of diligence on the part of Platoro Limited, Inc. in pursuing its rights.

As a starting point, it is obvious that the instant suit was not brought within the two year limitations period set forth in 46 U.S.C. §730. The issue then is whether such failure is fatal to Platoro's right to bring suit. Platoro will show this

Court that such failure is not fatal to Platoro's claim, and that the tendency of the cases has not been to construe 46 U.S.C. §730 in as strict a manner as hoped for by Petitioner. In the case of *Cavena v. The Lenco II*, 102 F. 2d. 213 (S.D. N.Y. 1951), a Third Party was impleaded on June 8, 1951, but the Appeals Court held that the impleader claim was barred by 46 U.S.C. §730. However, in considering the limitation issue, the Court noted that Respondent had filed no papers in opposition to the Plea of Limitation; therefore, the Court was "not aware of any special or unusual arguments in opposition to the granting of the relief sought". *Id.* at 214.

Certainly, the case of Platoro is one of those special or unusual circumstances contemplated by the Court and *Cavena, supra*. In this regard, the case of *Burnett v. New York Central Railroad Co.* 380 U.S. 424 (1965), is instructive for its discussion of the principles behind statutes of limitations. In that case, an employee had filed an FELA action in Ohio State Court which was ultimately dismissed for improper venue. The employee then filed eight days later, the same action in Federal Court, but more than three years after the cause of action had accrued.

The Supreme Court held that the employee's State Court action tolled the FELA limitation provision, and, therefore, his Federal Court action was timely. As the Court noted, the FELA limitation was not totally inflexible and the basic inquiry is whether congressional purpose is effectuated by tolling the statute of limitation in certain given circumstances. Certainly no reason can be discerned why the same inquiry should not be directed to the limitation provision under consideration in this case. The *Burnett* Court in its discussion, noted that statutes of limitation are primarily designed to assure fairness to Defendants and to relieve Courts "of the burden of trying stale claims when a plaintiff has slept on his rights." *Burnett, supra.* at 428.

Certainly, Platoro Limited has never been dilatory in attempting to preserve its claim. As the Fifth Circuit held in the instant case, "Nevertheless, the mere fact that a federal statute providing for substantive relief also sets a time limitation upon the institution of suit under the statute does not restrict power of the federal courts to hold that the statute of limitations is tolled under certain circumstances not inconsistent with the legislative purpose. *American Pipe and Construction Co. v. Utah*, 414 U.S. 538, (1974). See Appendix A-13.

The Petitioner in this action seems to be implying that Platoro has been negligent in two respects: Firstly, that Platoro filed suit in the wrong jurisdiction. Secondly, that Platoro should have acquired the State's permission to sue the State of Texas prior to maintaining any action. In response to these two allegations, Platoro would firstly point out that the jurisdiction was granted by a Federal District Judge, whose opinion was only reversed in May, 1975. With the rendering of that opinion, the Fifth Circuit Court of Appeals also noted, *in a footnote*, that possible Eleventh Amendment problems may be present. From that point on, Platoro sought diligently to secure legislative approval to sue the State. The State refused to give permission to Platoro the first time it was requested and finally gave legislative approval two years thereafter.

Platoro believes that the Fifth Circuit Court of Appeals in its opinion was correct in construing the case as it was presented to it and was fair in reversing and remanding the case for trial because, "they considered the facts and administered justice and equity as it should always be administered."

III.

The Petitioner complains that the Court of Appeals should not have ruled upon the issue of "marine peril". Platoro would

point out that Petitioner itself raised the "marine peril" question in the Appeal that was presented to the Fifth Circuit Court of Appeals. The second point that was raised by the State of Texas was that, "Platoro's complaint fails to state a claim for salvage services within the trial court's admiralty and maritime jurisdiction." Whereas, the State of Texas obviously felt that enough facts existed for the Fifth Circuit Court of Appeals to rule on the "marine peril" question, now that the State has been reversed and remanded, it is adopting an inconsistent position. Certainly, if the State believed that there were enough facts existent to determine the "maritime peril" question before it was reversed and remanded, now the State should not be given the opportunity to reverse its position and to hold that the factual situation was not present. Clearly, the facts do exist for this Court to make a determination on the issue of "maritime peril", and such matter is within the sound judicial of the Appellate Court.

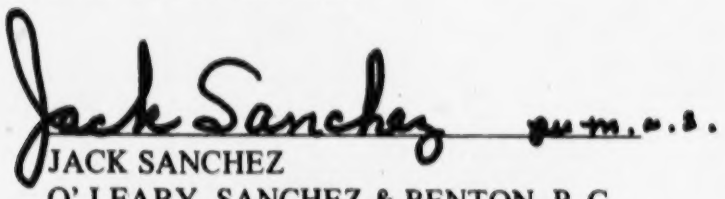
The recent case of ***Treasure Salvors, Inc. v. The Unidentified Wrecked and Abandoned Sailing Vessel,*** 569 F. 2d 330 (5th Cir. 1978), established that as a matter of law a wrecked and abandoned vessel which has been sunk for over 300 years, falls within the "marine peril" classification since it is "still in peril of being lost through the actions of the elements." *Id.* at 337.

In conclusion Platoro would reiterate its position that the Fifth Circuit Court of Appeals was correct in rendering its opinion and that, having weighed the facts and the law available to it, exercised sound, judicial discretion in rendering the opinion that it did.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,



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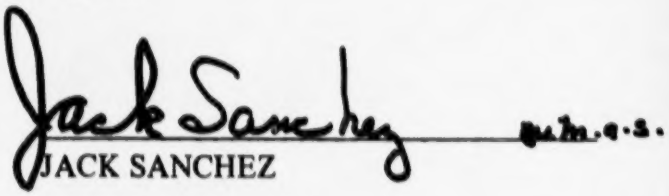
CERTIFICATE OF SERVICE

I, JACK SANCHEZ, attorney for Respondent, do hereby certify that three true and correct copies of the foregoing Respondent's Brief in Opposition to Petitioner's Petition For Writ of Certiorari have been served upon attorneys for Petitioner by placing same in the United States mail, certified, return receipt requested, addressed to the Honorable Mark White, Attorney General, State of Texas, and Connie Ode, Assistant Attorney General, Post Office Box 12548, Capitol Station, Austin, Texas 78711.



JACK SANCHEZ

APPENDIX

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

PLATORO LIMITED, INC.
VERSUS
THE UNIDENTIFIED REMAINS OF A VESSEL

CIVIL ACTION NO.
A-77-CA-112

MEMORANDUM AND ORDER

This is a suit in admiralty to gain title to, or alternatively to recover monetary compensation for the salvage of, certain items recovered from the shipwreck of a Spanish galleon off the coast of Padre Island. On November 4, 1977, the Court heard oral arguments on the motion of the State of Texas, a claimant, to dismiss the suit. After considering the motion, pleadings, briefs, and arguments, the Court is of the opinion the motion to dismiss should be granted.

This suit has had a checkered history which must be set out to understand fully the posture of the case in this Court. The Spanish galleon involved sank off the coast of Padre Island in the 1550's. The wreck was soon covered by a layer of sand and silt. Plaintiff, an Indiana corporation, started recovery operations in September of 1967, and ceased on December 13, 1977, pursuant tc a state court injunction. Plaintiff had apparently removed many of the recovered items to Indiana. The items were returned to Austin, Texas, by at least August 5, 1969, apparently pursuant to some sort of understanding between Plaintiff and the State of Texas that the parties would split the proceeds of the recovery 50-50. The Texas Land Commissioner then repudiated this understanding.

On August 6, 1969, Plaintiff filed suit in federal district court

in Brownsville, Texas making basically the same allegations as are made in this suit. That district court ultimately rendered a judgment for Plaintiff, ***Platoro Limited, Inc. v. The Unidentified Remains of a Vessel,*** 371 F. Supp. 356 (S.D. Tex. 1973), but that judgment was later reversed for lack of ***in rem*** jurisdiction, 508 F. 2d 1113 (5th Cir. 1975). The suit was then dismissed at the direction of the 5th Circuit on May 17, 1975.

In its opinion the 5th Circuit intimated that sovereign immunity might be a bar to the suit, 508 F. 2d 1115 at n.3, and apparently taking this warning to heart, Plaintiff says it sought permission to sue from the next session of the Texas legislature, but was not successful. This first attempt to obtain a waiver of sovereign immunity would have occured some 7 1/2 to 8 years after the cessation of salvage operations in 1967. On May 21, 1976, Plaintiff filed suit in this court (Civil Action No. A-76-CA-99), making the same allegations as made in the Brownsville suit and as are made in the present suit. This Court confirmed Plaintiff's fears and dismissed for failure of the State to consent to suit. Memorandum Order of August 13, 1976. No appeal was taken from that dismissal.

Plaintiff approached the following session of the state legislature and obtained a resolution, signed by the governor on May 27, 1977, authorizing suit, but expressly reserving all defenses other than that or sovereign immunity. The instant suit was then filed on June 23, 1977.

The State characterizes this suit as one in which Plaintiff is 1) suing for a declaration of title to the property recovered or, alternatively, 2) for an award for salvage services, to be secured by a maritime lien. Plaintiff says that it is not seeking a judgment of present ownership or "present title," but is only seeking an "award" of title as part of its salvage claim. Alternatively it seeks the monetary award for salvage services.

The State has moved to dismiss for failure to state a claim

or for lack of jurisdiction in admiralty. The State contends that the title is resjudicata because of the earlier Brownsville and Austin suits. Alternatively it says that the prior statements by this Court and the Brownsville court to the effect that title to the recovered goods was in the State were correct as a matter of substantive law. As to the salvage claim, the State argues that the suit is barred by the 2-year statute of limitations in 46 U.S.C. §730, or if not barred, that there is no jurisdiction because of a failure to allege (or be able to prove) "mairtime peril," which is said to be an element of a slavage claim.

The "Title Claim:

The Court need not devote much attention to the title question inasmuch as Plaintiff's counsel, during argument, expressly disavowed any claim to title and said Plaintiff was pursuing only its claim for a monetary salvage award. We note only that the disagreement between the parties concerning how to characterize the title claim appears to result from two distinct lines of cases on this type of situation. One line awards title to items recovered from an abandoned shipwreck to the first person to take possession of the goods, applying a "finders" theory. The other line of cases treats a wrecked or sunken ship as a "derelict" or "wreck of the sea" which, upon recovery, belongs to the sovereign unless claimed by the true owner within a year and a day. ***See*** 63 A.L.R. 2d 1360. This Court has already indicated, although perhaps only in dictum, that it feels that the latter line of cases applies to the facts alleged by Plaintiff.

The "Salvage" Claim:

46 U.S.C. §730 states that a ". . .suit for the recovery of remuneration for rendering assistance of salvage services shall not be maintainable if brought later than two years from the date when such assistance or salvage was rendered. . . ." The

statute contains its own tolling provision which provides that the suit may be brought after two years if ". . .during such period there had not been any reasonable opportunity of arresting the. . . salved vessel within the jurisdiction of the court. . . ."

We note initially that "46 U.S.C. §730 is a federal statute of limitations which contains its own tolling provisions" and that "[t]here has been no tendency on the part of the judiciary to erode the plain meaning of this statute." ***People of the Living God v. Star Towing Co.***, 289 F. Supp. 635, 638-39 (E.D. La. 1968) (order of quotations reversed). ***See also Basic Boats Inc. v. United States***, 311 F. Supp. 596 (E.D. Va. 1970); ***Tice Towing Line v. James McWilliams Blue Line***, 57 F. 2d 183 (2d Cir. 1932); ***Cavanaugh v. The Lenco II***, 102 F. Supp. 213 (S.D.N.Y. 1951); ***Canadian Government Merchant Marine v. Virginia Coaling Corp.***, 1929 A.M.C. 192 (E.D. N.Y. 1929).

It is clear to the Court that Plaintiff cannot place itself within the literal wording of §730's tolling provision. The recovered items were within the Western District of Texas since at least August 5, 1969, and of course at all times were subject to the jurisdiction of some federal court. Thus it is clear that there was an opportunity to "arrest" the salved goods within two years after the rendition of any salvage service. That a suit might not have been maintainable during that period because of a sovereign immunity defense on the part of the other claimant does not mean that the goods could not have been arrested, just as the presence of an affirmative defense does not affect the validity of process in an ordinary civil suit. Similarly, even assuming that the pendency of the two prior federal suits might in some manner have tolled limitations, it is clear that for a total of some 42 months since the cessation of salvage operations and prior to the filing of this suit, there was no suit pending with regard to these matters. Moreover, the Brownsville suit, the only one filed within the two year limit, was filed in a court lacking jurisdiction. Consequently,

the only way Plaintiff could hope to avoid limitations is simply to argue that limitations started running only after the State gave its consent to suit. Even then, Plaintiff did not actually seek the State's consent until many years after the end of salvage operations.

While Plaintiff's arguments might have considerable merit if an equitable theory of laches were being applied, this Court does not feel that it is in a position to ignore the literal wording of a Congressional statute. 46 U.S.C. §730 states that the limitations period begins to run "from the date when such assistance or salvage was rendered" and contains its own tolling provision which, as noted, is inapplicable to Plaintiff.

Commencement of the limitation period on the date when assistance or salvages services were rendered contrasts significantly with the frequent commencement of limitations periods on the date when the "cause of action accured." Indeed most, if not all, of the cases cited by Plaintiff for the proposition that limitations does not begin to run in favor of the sovereign until the sovereign consents to suit involve limitation statutes using the "accrual" language. *See, e.g., United States v. Fuston*, 143 F.2d 76 (10th Cir. 1944); *Walker v. State*, 103 S.W. 2d 404 (Tex. Civ. App. –Waco 1937, no writ). The Supreme Court has noted the importance of such a difference in wording of the limitations statute in another context:

> "[I]f Congress had intended that the cause of action of the shipper to recover damages for unreasonable charges should accrue when the shipment was received, or when it was delivered by the carrier, we cannot doubt that a simple and obvious form for expressing that intention would have been used, instead of the expression 'from the time the cause of action accrues.' " *Louisiville Cement Co. v. Interstate Commerce Comm'n*, 246 U.S. 638, 644 (1918).

The Court feels that in 46 U.S.C.§730 Congress did adopt a "simple and obvious form of expression" to indicate its intention that the period of limitation should begin to run from the date of rendition of services and not from the date a suit might first be legally instituted. The language of Congress is specific and controlling; it is not for this Court to ignore it.

Having decided that Plaintiff's action is barred by limitations, the Court need not discuss the question of "marine peril."

It is accordingly

ORDERED that the State's motion to dismiss be GRANTED, and that this suit be DISMISSED for failure to state a claim upon which relief can be granted.

Entered this 14 day of November, 1977, at Austin, Texas.

/s/

JACK ROBERTS
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF TEXAS - AUSTIN DIVISION

CIVIL ACTION FILE NO. A-77-CA-112

PLATORO LIMITED, INC.
VERSUS
The unidentified remains of a vessel, her cargo, apparel, tackle, and furniture, in a cause of salvage, civil and maritime

JUDGEMENT

This action came on for trial (hearing) before the Court, Honorable Jack Roberts, United States District Judge, presiding, and the issues having been duly tried (heard) and a dedision having been duly rendered,

It is Ordered and Adjudged that State's motion to dismiss be, GRANTED, and that this suit be DISMISSED for failure to state a claim upon which relief can be granted.

Dated at AUSTIN, Texas this 14th day of November, 1977.

DAN W. BENEDICT
Clerk of Court

_____

Wanda V. Peterson
Deputy Clerk

PLATORO LTD., INC. v. UNIDENTIFIED REMAINS, ETC.
Cite as 614 F.2d 1051 (1980)

PLATORO LIMITED, INC.,
Plaintiff-Appellant,

VERSUS

The UNIDENTIFIED REMAINS OF A VESSEL, her cargo, apparel, tackle, and furniture, in a cause of salvage, civil and maritime, Defendant-Appellees.

No. 1052

United States Court of Appeals, Fifth Circuit.

April 4, 1980

April 4, 1980.

Rehearing and Rehearing En Banc Denied May 8, 1980.

Salvage company appealed from judgment entered by the United States District Court for the Western District of Texas, Jack Roberts, Chief Judge, dismissing its suit in rem to obtain title to unidentified remains of Spanish vessel abandoned over 400 years earlier and resting on bottom of Gulf of Mexico, or seeking reasonable compensation for salvage services in recovering the vessel. The Court of Appeals, Ainsworth, Circuit Judge, held that: (1) circumstances favored tolling two-year statute of limitations for suit for recovery of remuneration for rendering salvage services, and (2) "marine peril" existed in the abandoned Spanish vessel, and thus complaint stated claim for compensation cognizable within admiralty and maritime jurisdiction of district court.

Reversed and remanded.

Jack D. Sanchez, Brownsville, Tex., for Plaintiff-Appellant.

John L. Hill, Atty. Gen., Paul B. Gavia, Connie Ode, Asst. Attys. Gen., Austin, Tex., for defendants-appellees.

Appeal from the United States District Court for the Western District of Texas.

Before AINSWORTH and HENDERSON, Circuit Judges, and HUNTER, * District Judge.

AINSWORTH, Circuit Judge:

Plaintiff Platoro Limited, Inc. appeals from a judgment of the United States District Court for the Western District of Texas dismissing its suit *in rem* to obtain title to the unidentified remains of a Spanish vessel abandoned over 400 years earlier (in 1554) and resting on the bottom of the Gulf of Mexico off the coast of Padre Island, Texas. Alternatively, plaintiff sought reasonable compensation for salvage services in recovering the vessel. Plaintiff requested issue of process against the State of Texas prusuant to a resolution of the Texas Legislature which authorized suit against it. The court held that plaintiff's suit was barred by the applicable statute of limitations and granted the State of Texas' motion to dismiss. We reverse and remand.

On September 11, 1967, Platoro, an Indiana corporation, commenced operations for recovery of the remains of a 16th century Spanish ship which was found buried under a layer of sand in 30-40 feet of water in the Gulf of Mexico. 1/ Thereafter, on December 13, 1967, the State of Texas filed suit in

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*District Judge of the Western District of Louisiana, sitting by designation.

1/ The State of Texas points out in its brief that Platoro commenced

the 28th Judicial District Court of Kenedy County, Texas, to enjoin Platoro from further recovery operations. The injunction was issued on December 31 and Platoro ceased all activities. Negotiations between Platoro and the Texas Land Commissioner followed and a settlement was reached whereby Platoro and the Commissioner agreed to divide the artifacts recovered. Pursuant to the agreement, Platoro returned the artifacts from Indiana to state custody in Texas.

On August 6, 1969, approximately 19 months after its

1/Continued

recovering the artifacts in question "without a permit to do business in Texas, without a permit to explore or excavate an archeological site, and without any notice to the State of Texas." However, the Texas Antiquities Code, Tex.Rev.Civ.State.Ann. art. 6145-9 (Vernon), which deals explicitly with the State's requirement for salvaging vessels abandoned at sea, had not been enacted at the time Platoro engaged in its salvaging operations.

Texas also argues that Platoro violated Tex.Pen.Code Ann. art. 147b (Vernon)(repealed 1969) by failing to obtain a permit or license to explore or excavate "in or on any prehistoric ruins or archeological or vertebrate paleontological site in Texas." and Tex.Bus.Corp.Act. Ann. art. 8.01 (Vernon), by failing to obtain a certificate to transact business in the State of Texas. Whether appellant's activities were in violation of the Texas Penal Code is irrelevant to the issues involved here.

With regard to Platoro's failure to obtain a certificate to transact business in Texas, appellant may reasonably have assumed that such a certificate was not necessary considering the nature of its activities and the fact that they took place off the coast of Texas. Nonetheless, subsequent to the seizure of the artifacts by the State, Platoro filed for a Certificate of Authority to transact business in Texas, which was granted in 1969 and is still in force.

Moreover, Platoro's failure to obtain the above permits prior to commencing its salvaging activities does not prohibit it from seeking compensation in this case.

operations had ceased, and upon realizing that the State was not going to honor its agreement with the Commissioner, Platoro filed an *in rem* action in federal court in the Southern District of Texas to obtain title to the artifacts recovered or, alternatively, reasonable compensation for salvage services. The district court held that plaintiff Platoro was entitled to compensation for its salvaging operations and awarded judgment in the amount of $131,248. ***Platoro Limited, Inc. v. The Unidentified Remains of a Vessel, 371 F.Supp. 356*** (S.D. Tex. 1973). On appeal, this court reversed the judgment on the ground that the district court lacked *in rem* jurisdiction, since the artifacts were not lacked within the Southern District of Texas when the suit was filed. 2/ ***Platoro Limited, Inc. v. The Unidentified Remains of a Vessel,*** 508 F.2d 1113 (5th Cir. 1975). The court remanded the case to the district court to dismiss the suit, which it did on May 17, 1975.

In a footnote to its opinion, this court also noted that the "proceeding raises serious Eleventh Amendment questions." *Id.* at 1115 n.3. Platoro, therefore, attempted to obtain permission from the State of Texas at the next legislative session to bring suit against it. Its efforts were unsuccessful, so on May 21, 1976 it again filed suit against the State of Texas, in federal court in the Western District of Texas, alleging the same claims which were set forth in the prior suit. On August 13, 1976, the district court dismissed the suit based on the eleventh Amendment's bar to the court's jurisdiction, since the State had failed to waive sovereign immunity.

2/ Although the sunken vessel was buried in territorial waters within the Southern District of Texas and the salvaging operations took place there prior to the time suit was brought, Platoro had removed the artifacts recovered to date to its home office in Indiana and later, pursuant to an agreement with the State of Texas, had relinquished possession of them to Texas which has continually held them in Austin in the Western District of that state.

At the next session of the Texas Legislature, Platoro succeeded in obtaining a waiver of sovereign immunity by virtue of a resolution which was signed by the Governor on May 27, 1977. This suit was then commenced on June 23, and on July 18, the State of Texas moved to dismiss plaintiff's complaint for lack of jurisdiction over the subject matter and for failure to state a claim on which relief could be granted. 3/ In its motion, the State asserted, among other things, that Platoro's complaint failed to state a claim for remuneration for salvage services within the court's admiralty and maritime jurisdiction; also that the claim was barred by the applicable statute of limitations, 46 U.S.C. §730. 4/ The district court held that Platoro's actions was barred by the two-year limitation period set out in section 730, and thus expressly found it unnecessary to decide whether plaintiff's complaint stated a salvage claim within the court's admiralty and maritime jurisdiction. Accordingly, on November 14, 1977, the district court dismissed plaintiff's suit and plaintiff brought this appeal.

The pertinent statutory provision, 46 U.S.C. § 730, establishes a two-year limitation period for suits for the recovery

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3/ When the motion was orally argued, plaintiff Platoro's counsel stated that it was proceeding solely on its claim for compensation for salvage services, and no longer asserted a claim of title to the property.

4/ 46 U.S.C. §730 states:

> A suit for the recovery of remuneration for rendering assistance or salvage services will not be maintainable if brought later than two years from the date when such assistance or salvage was rendered, unless the court in which the suit is brought shall be satisfied that during such period there had not been any reasonable opportunity of arresting the assisted or salved vessel within the jurisdiction of the court or within the territorial waters of the country in which the libelant resides or has his principal place of business.

of remuneration for rendering salvage services, which period runs from the date the services were rendered. The statute contains a proviso, however, that suit may be brought after two years if "during such period there had not been any reasonable opportunity of arresting the . . . salved fessel within the jurisdiction of the court." The action which precipitated this appeal was not commenced until July 1977, more than nine years after the salvage services were rendered. The artifacts made the subject of the suit were physically within the Western District of Texas at Austin since 1969 when plaintiff brought them there from Indiana. Thus, Platoro does not come within the above-quoted language of the tolling provision of the statute.

Nevertheless, the mere fact that a federal statute providing for substantive relief also sets a time limitation upon the institution of suit under the statute does not restrict the power or the federal courts to hold the statute of limitations is tolled under certain circumstances not inconsistent with the legislative purpose. ***American Pipe and Consturuction Co. v. Utah***, 414 U.S. 538, 559, 94 S. Ct. 756, 769, 38 L.Ed. 713 (1974); ***Leake v. University of Cincinnati***, 605 F.2d 255, 259 (6th Cir. 1979); ***cf. Mizell v. North Broward Hospital District***, 427 F.2d 468 (5th Cir. 1970). Judicial power to toll statutes of limitations on equitable grounds was firmly established in ***Burnett v. New York Central Railroad***, 380 U.S. 424, 85 S. Ct. 1050, 13 L. Ed. 2d 941 (1965). ***Burnett*** involved the dismissal for improper venue of an action filed in state court under the Federal Employers' Liability Act. At the time suit was later commenced in the proper district but in federal court, the limitations period established by the Act had already run. The Court noted that the period is not totally inflexible, but under appropriate circumstances may be extended. The basic question is whether tolling the statute in a particular case is in keeping with the legislative intent underlying the Act itself. 380 U.S. at 426, 85 S. Ct. at 1053. In noting that statutes of limitations are

designed primarily to assure fairness to defendants by preventing the revival of claims that have been allowed to slumber until evidence has been lost and witnesses have disappeared, the Court pointed out that this "policy of repose" is frequently outweighed where "the interests of justice require the vindication of the plaintiff's rights." 380 U.S. at 428, 85 S.Ct. at 1054-55.

Tolling of the statute of limitations under the circumstances here is warranted to allow Platoro an opportunity properly to pursue its claim on the merits. Here the vessel from which the artifacts were retrieved was located in the Southern District of Texas at the time Platoro's first suit was instituted, and the recovery operations made the basis of the suit took place there. It was not unreasonable for Platoro to assume these facts were sufficient for a determination that the court had proper jurisdiction over the res. In fact, the district court so held, although erroneously. *Platoro Limited, Inc., supra,* 371 F. Supp. at 358-59. It would not be inconsistent with the legislative intent underlying the statute at issue to avoid the injustice that would result from the dismissal of Platoro's claim because it made an erroneous choice with regard to the true location of the subject matter of the suit.

Furthermore, filing of Platoro's first lawsuit showed "proper diligence on the part of the plaintiff which such statutes of limitation were intended to insure." *Goldlawr, Inc. v. Heiman,* 369 U.S. 463, 467, 82 S. Ct. 913, 916, 8 L. Ed. 2d 39 (1962). Appellant was not dilatory in attempting to preserve its claim. After the State of Texas filed suit, Platoro negotiated an agreement with the State Land Commissioner to divide the artifacts. When it appeared that the State was not going to honor the agreement, appellant filed its suit well within the two-year period. When the decision in that case was reversed on appeal and this court noted that the proceeding raised serious Eleventh Amendment questions, Platoro apparently realized that a waiver of sovereign immunity would likely be necessary for a success-

ful claim against the State. After failing to get a consent to suit resolution from the State at the next legislative session, Platoro filed suit once again in order to protect its claim. After that action was dismissed, appellant successfully obtained a waiver of sovereign immunity from the Texas Legislature. Platoro brought the present suit within three weeks of the signing of the Texas Legislature resolution. At no time did a period of two years run without the intervention of legal action by appellant. Moreover, the State of Texas has been cognizant of this claim from almost the beginning Texas initiated the controversy by filing suit for injunctive relief in 1967. At that time the State was aware that Platoro claimed compensation for salvaging the artifacts.

In the final balance, therefore, the circumstances favor tolling the statute of limitations and granting Platoro the right to have its claim adjudicated. 5/

We next consider the question whether Platoro's complaint states a claim for compensation for salvage services cognizable within the court's admiralty and maritime jurisdiction. The State of Texas argues that one of the elements of a salvage action – the existence of a marine peril – is absent from this controversy, 6/ since the vessel has been "rest[ing] peacefully

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5/ In view of our holding, we find it unnecessary to announce a broad rule regarding Platoro's contention that the statute of limitations did not begin to run until Texas gave its consent to suit. *See United States v. Fuston*, 143 F. 2d 76 (10th Cir. 1944). Platoro's efforts to preserve its claim have operated in each instance to toll the statute sufficient to prevent a bar to maintaining its present suit.

6/ It is well established that in order to present a valid salvage claim three elements must be shown: "(1) a marine peril, (2) service voluntarily rendered when not required as an existing duty or from a special contract, and (3) success in whole or in part, or that the service rendered contributed to such success." *Legnos v. M/V Olga Jacob*, 498 F.2d 666, 669 (5th Cir. 1974). Texas complains that only the first of these elements is lacking.

on the floor of the Gulf of Mexico for over 400 years," and is not "suffering form an impending peril of the sea." We disagree.

In a striking similar case, this court recently decided that a party claiming an award for the salvage of a vessel abandoned at sea could properly proceed under the court's admiralty jurisdiction. ***Treasure Salvors, Inc. v. the Unidentified Wrecked and Abandoned Sailing Vessel,*** 569 F. 2d 330 (5th Cir. 1978). We said in that case that a "[m]arine peril includes more than the threat of storm, fire or piracy to a vessel in navigation." 7/ *Id.* at 337. Thus, a marine peril existed in a wrecked and abandoned vessel, which sank in 1622 off the Marquesas Keys in waters off the Florida coast, and whose location was unknown for over 300 years. Further, the court said that this peril existed even after discovery of the location of the vessel, since it was "still in peril of being lost through the actions of the elements." 8/ *Id.* at 337.

Our decision in ***Treasure Salvors*** is thus dispositive of the

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7/ In a footnote, the court noted that " '[t]he peril required in a salvage service need not necessarily be one of imminent and absolute danger. The property must be in danger, either presently or reasonably to be apprehended.' " *Treasure Salvors, Inc. v. The Unidentified Wrecked and Abandoned Sailing Vessel,* 569 F. 2d 330, 337 n. 13 (5th Cir. 1978), *quoting* Norris, The Law of Salvage § 185 (1958).

8/ In our earlier statement that the vessel was resting on the bottom of the Gulf of Mexico, 30 to 40 feet under water, covered by 4 to 10 feet of sand, thus "impervious to weather conditions above the surface of the sea," with the "sand prevent[ing] deterioration underwater," *Platoro Limited, Inc. v. Unidentified Remains of a Vessel,* 508 F.2d 1113, 1114-15 n.1 (5th Cir. 1975), the court was not addressing the issue whether a marine peril existed for purposes of determining if plaintiff presented a valid salvage claim. Later, when we squarely considered the question in *Treasure Salvors, supra, we determined that such conditions present a* marine peril for purposes of meeting the requirements of a valid salvage action.

issue whether appellant properly invoked the court's admiralty jurisdiction in its claim for compensation here. 9/ We therefore hold that Platoro's complaint states a valid salvage claim and remand this case to the district court for a determination of the merits.

REVERSED AND REMANDED.

9/ The State of Texas makes much of the fact that in *Treasure Salvors, supra*, the vessel was abandoned partially in international waters, whereas here the wreck lay in territorial waters off the Texas coast. This distinction, however, is not determinative of whether a marine peril existed for purposes of meeting the requirements of a salvage action.

THE STATE OF TEXAS

SECRETARY OF STATE

I, MARK WHITE, Secretary of State of the State of Texas DO HEREBY CERTIFY that the attached is a true and correct copy of House Concurrent Resolution Number 117, passed by the 65th Legislature, Regular Session, 1977, signed by the Governor on May 27, 1977, and filed in this office on May 28, 1977.

IN TESTIMONY WHEREOF, I have hereunto signed my name officially and caused to be impressed hereon the Seal at my office in the city of Austin, this

3rd day of June, *A.D. 1977*

/S/

Secretary of State

H.C.R. No. 117

HOUSE CONCURRENT RESOLUTION

WHEREAS, Platoro Limited, Incorporated, a foreign corporation authorized to transact business in the State of Texas, alleges that it recovered the remains of a vessel and its cargo, tackle, and furniture; and

WHEREAS, Platoro Limited, Incorporated, alleges that the State of Texas has taken possession of those remains without compensating Platoro Limited, Incorporated, for its expense in the salvage operation; now, therefore, be it

RESOLVED by the House of Representatives of the State of Texas, the Senate concurring, That Platoro Limited, Incorproated, is hereby granted permission to sue the State of Texas for whatever relief to which it may be entitled as a result of the state's taking possession of these remains; and, be it further

RESOLVED, that in the event suit is filed, service of citation and other required process be made on the Attorney General of the State of Texas, and that the suit be tried as other civil suits; and, be it further

RESOLVED, That nothing in this resolution may be construed as an admission by the State of Texas, or by any of its employees, agents, departments agencies, or political subdivisions of liability or of the truth of any allegation asserted by the claimant, but the alleged cause of action must be proved under the laws of this state as in other civil suits; and, be it further

RESOLVED, That nothing in this resolution may be construed as a waiver of any defense, of law or fact, available to the State of Texas or to any of its employees, agents, departments, agencies, or political subdivisions, but every defense is specifically reserved.

-END-

/S/

President of the Senate

/S/

Speaker of the House

I certify that H. C. R. No. 117 was adopted by the House on May 13, 1977, by a non-record vote.

/S/

Chief Clerk of the House

I certify that H. C. R. No. 117 was adopted by the Senate on May 20, 1977.

/S/

Secretary of the Senate

APPROVED: 27 May 1977

DATE